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5/14/07

No. 06-637

IN THE

Supreme Court of the United States

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,

Petitioner,

v.

TOM F., ON BEHALF OF GILBERT F., A MINOR CHILD,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF THE U.S. CONFERENCE OF MAYORS, NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the holding of the court of appeals that IDEA permits tuition reimbursement where a child has not previously received special education from a public agency contradicts the plain language of 20 U.S.C. § 1412(a)(10)(C)(ii).

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States.[1] Legal issues concerning the provision of primary and secondary education are of singular fiscal and social importance to *amici*. Public education is the largest expenditure of state and local governments and is central to the quality of life and productivity of the citizenry and to the future of the nation.

The judgment of the court of appeals seriously disrupts the planning and implementation of special education programs for the millions of disabled children served by our public schools. By ruling that parents like respondent are free to seek reimbursement for private school tuition without seriously engaging in a cooperative process with public school special education experts as required by IDEA, the holding below will divert funds from achieving the statute's purpose – effective special education of millions of disabled children. It will waste IDEA money on IEPs that will never be implemented and whose crafting will be followed by costly litigation to obtain private school tuition reimbursement and attorney's fees.

As this Court has repeatedly noted, it is Congress' intent that "IDEA's promise of a 'free appropriate education' for disabled children would normally be met by . . . education in the regular public schools or in private schools chosen jointly by school officials and parents." *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 12 (1993). Because of the importance to *amici* and their members of ensuring that

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[1] The parties have consented to the filing of this brief, and their letters of consent filed have been filed with the Clerk of the Court. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

Congress' goals for the education of the nation's disabled children are honored, *amici* submit this brief to assist the Court in its resolution of the case.

STATEMENT

1. IDEA was enacted in 1970 and substantially amended in 1975, a time when "the majority of disabled children in America were either totally excluded from schools or sitting idly in regular classrooms awaiting the time when they were old enough to 'drop out.'" *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 51-52 (2005) (citation omitted). The 1975 amendments were a reaction to two landmark cases that had remedied the outright exclusion of disabled children from the public schools of Pennsylvania and the District of Columbia. *See Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 192-93 (1982) (citing *Penn. Ass'n for Retarded Children v. Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971) and 343 F. Supp. 279 (1972); *Mills v. Bd. of Ed. of Dist. of Columbia*, 348 F. Supp. 866 (D.D.C. 1972)).

Congress' determination to put an end to the exclusion of disabled children from public schools is reflected both in the legislative history of the Act and its language. For example, as this Court has noted, Senator Cranston expressed the concern that "millions of handicapped children . . . 'are largely excluded from the educational opportunities that we give to our other children.'" *Rowley*, 458 U.S. at 191 n.13 (quoting 121 Cong. Rec. 19494, 19502 (1975)). And Representative Mink deplored the fact that "handicapped children . . . are denied access to public schools because of a lack of trained personnel." *Id.* (quoting 121 Cong. Rec. at 23708).

Thus, "the face of the statute evinces a congressional intent to bring previously excluded handicapped children into public education systems of the States." *Id.* at 189. "Congress intended that IDEA's promise of a 'free appropriate public

education' for disabled children would normally be met by . . . education in the regular public schools or in private schools chosen jointly by school officials and parents." *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 12 (1993). The central role of public schools in educating disabled children is also evidenced in the "mainstreaming" provision of the Act, which requires that "'to the maximum extent appropriate' [States] must educate handicapped children 'with children who are not [handicapped].'" *Rowley*, 458 U.S. at 181 (quoting 20 U.S.C. § 1412(a)(5)(A)).

IDEA "is frequently described as a model of 'cooperative federalism.'" *Schaffer*, 546 U.S. at 52 (internal quotation marks and citation omitted). "States [have] the primary responsibility for developing and executing educational programs for handicapped children." *Id.* (internal quotation marks omitted). In some jurisdictions special public schools for the disabled exist, with the result that placement of disabled children in private school at public expense is almost unheard of.[2] Other jurisdictions use a combination of public school and mutually-agreed private school placements to meet their IDEA obligations to disabled children.[3]

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[2] See Christopher J. Walker, Note, "*Adequate Access Or Equal Treatment: Looking Beyond The Idea To Section 504 In A Post-Schaffer Public School*," 58 STAN. L. REV. 1563, 1576 (2006) (describing Texas as an "ideal example of a state with fully inclusive state special schools, [whose] admission policies take into account . . . the IDEA's FAPE considerations. . . . In addition, these policies are not just lip service: what is written is also put into practice."). As a result, the number of private special education placements in Texas is miniscule. *See* Jay P. Greene & Marcus A. Winters, "Debunking a Special Education Myth," 2007 Education Next, Table 1 (Hoover Institution 2007) (only 198 IDEA private placements in Texas in 2003-04).

[3] *See* Walker, *supra*, 58 STAN. L. REV. at 1577-78 (discussing States that use combination of public and private placements for disabled children).

2. "The core of the statute . . . is the *cooperative process* that it establishes between parents and [public] schools." *Schaffer*, 546 U.S. at 53 (emphasis added). The individualized educational program, or IEP, is the vehicle for this cooperative process. A detailed blueprint tailored to the needs of the child, the IEP is "prepared at a meeting between a qualified representative of the local educational agency, the child's teacher, the child's parents or guardian, and, where appropriate, the child." *Rowley*, 458 U.S. at 182. As this Court has noted, "[p]arents and guardians play a significant role in the IEP process" and parents are expressly "included as members of 'IEP teams.'" *Schaffer*, 546 U.S. at 53.

Public school officials and teachers are no less important than parents in formulating the IEP. As this Court recently affirmed, "IDEA relies heavily upon the expertise of school districts to meet its goals." *Id.* at 59; *see also id.* at 62-63 (Stevens, J., concurring) ("I believe that we should presume that public school officials are properly performing their difficult responsibilities under this important statute.").

While the statute requires that the child be provided with an "appropriate" education, this Court long ago made clear that IDEA does not contain "any substantive standard prescribing the level of education to be accorded handicapped children." *Rowley*, 458 U.S. at 189. "[T]he requirement that a State provide specialized education services to handicapped children generates no additional requirement that the services so provided be sufficient to maximize each child's potential 'commensurate with the opportunity provided other [nondisabled] children'" in public school. *Id.* at 198. In other words, IDEA does not require States "to maximize the potential of each handicapped child commensurate with the opportunity provided nonhandicapped children." *Id.* at 200.

3. IDEA provides for administrative and judicial review of an IEP in the event either the parent or the school district is dissatisfied, although virtually all challenges to IEPs are

initially brought by parents, *see Schaffer*, 546 U.S. at 53-54, who may recover attorney's fees if they prevail. *See id.* at 54 (citing 20 U.S.C. §1415(i)(3)(B)). As this Court noted less than two years ago, even the administrative review process is very costly; "[l]itigating a due process complaint is an expensive affair, costing schools approximately $8,000-to-$12,000 per hearing." *Id.* at 59. Consequently, Congress has "repeatedly amended the Act in order to reduce its administrative and litigation-related costs," *id.*, which divert limited resources away from the core purposes of the Act.

Parents who are dissatisfied with an IEP that does not include placement of the child in private school can unilaterally withdraw their child from public school, place the child in private school, and retroactively seek tuition reimbursement through litigation. *See Sch. Comm. of Town of Burlington v. Dep't of Educ.*, 471 U.S. 359, 367 (1985). They do so, however, "at their own financial risk," *Florence County*, 510 U.S. at 15, and "are entitled to reimbursement *only* if a federal court concludes both that the public school placement violated IDEA and that the private school placement was proper under the Act." *Id.* (internal quotation marks omitted). *See also Burlington*, 471 U.S. at 370; *Rowley*, 458 U.S. at 206. The cost of such protracted litigation necessarily means that the option of unilateral private placement will be available only for a small number of the many millions of disabled children throughout the United States.

SUMMARY OF ARGUMENT

The language of 20 U.S.C. § 1412(a)(10)(C)(ii), especially when read in its statutory context and in light of Congress' purposes in enacting and amending IDEA, clearly makes the previous receipt of "special education and related services under the authority of a public agency" a precondition for tuition reimbursement. To read the subsection's language to permit reimbursement to a parent who unilaterally places a

child in private school without having any intention of ever sending the child to public school would render the operative statutory language meaningless.

A. Congress' overarching intent in enacting and amending IDEA was to end the exclusion of disabled children from public school and to educate them in public schools with non-disabled children whenever possible. IDEA also addresses the needs of disabled children in private schools in two contexts: (1) children placed in, or referred to, private schools by public agencies; and (2) children unilaterally enrolled in private school by their parents. As to the latter, IDEA provides that such children will ordinarily have no individual right to special education and will receive only limited services from public agencies.

The standards set forth in IDEA for special education are thus directed principally at children educated in a public school or in private school pursuant to a recommendation by a public school. Subsection 1412(a)(10)(C)(ii) is a narrow exception to the general rule that public schools are the schools of first resort for disabled children and that unilateral parental placements are not publicly reimbursed. It was added to IDEA in 1997 following this Court's decisions upholding reimbursement in specified circumstances for unilateral private placements.

Congress took particular care in the 1997 amendments to protect the States' fisc. In § 1412(a)(10), Congress specifically limited public tuition reimbursement for unilateral private placements to cases in which the parent and child have gone through the IEP process, and the child has been educated in the public schools pursuant to the IEP. If those prerequisites are met, then a parent who believes that the public school is not providing an appropriate education can place the child in private school and seek reimbursement from the public school district.

B. This construction of the statute is supported by other language in subsection (C)(ii) and the limitations on reimbursement contained in subsection (C)(iii). Congress' use of the past tense throughout these subsections demonstrates that reimbursement is conditioned on the child's previous public placement. In addition, the substance of the limitations set forth in subsection (C)(iii) reinforces the conclusion that prior enrollment in public school is a precondition for tuition reimbursement. The statute expressly requires that an IEP meeting be held, an IEP be formulated, and parents give notice of their dissatisfaction with the IEP "prior to the removal of the child from the public school" and before acting upon their "intent to enroll their child in private school at public expense." 20 U.S.C. § 1412(a)(10)(C)(iii)(I)(aa).

C. The fundamental purposes of IDEA will be subverted if parents who never sent, or intended to send, their child to public school can obtain tuition reimbursement through litigation. The core of the statute is the cooperative process that it establishes between parents and public schools. Cooperation is impossible if parents are determined from the outset to send their child to private school at public expense. Moreover, IDEA mandates that parents are members of their child's IEP team, a requirement that becomes counterproductive if parents go through the motions solely in order to lay the foundation for a later tuition reimbursement claim.

Equally important, the rule adopted by the court of appeals ignores Congress' express intent that disabled children be mainstreamed with children who are not disabled. The ruling below also defeats Congress' intent by diverting funds from the education of disabled children to the formulation of IEPs that will never be implemented—an indefensible waste of scarce public resources and special education expertise.

D. The court of appeals based its ruling in part on its view that a straightforward reading of the statute's text leads to absurd results. One asserted absurd result would disad-

vantage children whose disabilities are detected before they reach school age; the other would require parents to acquiesce in an inappropriate placement in order to preserve their right to seek reimbursement. Each of these concerns is illusory.

First, IDEA expressly contemplates the provision of special education services to preschool children. Children who have received such early-intervention services before reaching school age have "received special education and related services under the authority of a public agency" and can therefore seek tuition reimbursement as they approach elementary school age if they receive an inappropriate IEP before they start school.

The second absurd result rests on the premise of a flagrantly inadequate IEP, such that it is unreasonable to require the child to try out the public school plan even for a very short time. While that situation is imaginable, there is no reason to believe that it is other than exceedingly rare. The unstated premise of this asserted result is that public school special education specialists cannot be trusted, but this Court has held otherwise, repeatedly stating that IDEA relies heavily upon the expertise of public educators to meet its goals.

The absurd results posited by the court below are thus chimerical. There are many parents who plan to enroll their child in private school and later roll the dice on litigation to compel the public school to pay their child's tuition as well as their attorney's fees. This Court has already ruled that parents dissatisfied with the special education services set forth in an IEP may unilaterally place their child in private school and later seek reimbursement and fees. Under the express terms of IDEA, however, they may not do so unless their child has previously received special education under the authority of the public school.

ARGUMENT

SECTION 1412(a)(10)(C)(ii) MAKES PRIOR RECEIPT OF SPECIAL EDUCATION "UNDER THE AUTHORITY OF A PUBLIC AGENCY" A PRECONDITION FOR TUITION REIMBURSEMENT

The section of IDEA that governs "payment for education of children [unilaterally] enrolled in private school" provides:

> If [(1)] parents of a child with a disability, who [(2)] previously received special education and related services under the authority of a public agency, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if [(3)] the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.

20 U.S.C. § 1412(a)(10)(C)(ii) (bracketed numbers added). On its face, this language appears to embody essential, threshold requirements that must be satisfied before a claim may lie against a public agency for reimbursement by a parent of a child unilaterally placed in a private school.

The question presented in this case arises from particular language used in connection with the second element relating to the prior receipt of "special education and related services under the authority of a public agency." The statute's use of the language "who previously received" was seized upon by the court below as merely descriptive and not actually imposing an essential prerequisite for the award of reimbursement for the costs of private education. *See* J.A. 101.

As set forth in the following sections of this brief, the structure of the IDEA, the particular language used in

surrounding and related provisions, and the general policies behind the Act, lend unmistakable support to the conclusion that the "who have previously received" clause does, in fact, embody an express essential prerequisite to reimbursement for the costs of a private education. But even looking only at the single sentence quoted above, that result seems quite clear. For to read the provision otherwise, and permit reimbursement to parents who have unilaterally placed their child in private school without sending or having any intention of sending their child to public school, would mean that that clause simply has no meaning at all. This Court has long been reluctant to read statutes in a way that makes certain language "mere surplusage." *See South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 510 n.22 (1986) (a "statute should be interpreted so as not to render one part inoperative") (internal quotation marks omitted); *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) ("It is our duty to give effect, if possible, to every clause and word of a statute") (internal quotation marks omitted).

A. Tuition Reimbursement for Private School Placements Made Without Consent of a Public Agency is a Narrow Exception to the General Rule of Non-Reimbursement for Unilateral Private Placements

IDEA expresses Congress' intent that disabled children receiving special education services under the Act be placed in public school, and mainstreamed with non-disabled children whenever possible. *See* pp. 2-3, *supra*. At the same time, Congress recognized that many disabled children attend non-public schools, some of whom are placed in such schools by a public agency and some unilaterally by their parents. 20 U.S.C. § 1412 (a)(10)(C). Consequently, IDEA contains a lengthy subsection that specifically governs the States' obligations to "Children in Private Schools." *Id.* §1412(a)(10). The statute draws a sharp line between children placed in or

referred to private schools by a public agency, where the agency assumes the cost, *id.* §1412(a)(10)(B),[4] and unilateral parental placements, where reimbursement is the rare exception, *id.* §1412(a)(10)(C)(ii).

Under these programs, "children enrolled in private school by their parents"—meaning unilaterally and without placement in or referral by public agencies—have no individual right to special education and generally receive only limited "services" from public school districts. *See* 20 U.S.C. § 1412(a)(10)(A). The intent of § 1412(a)(10) has been consistently articulated by the courts of appeals: IDEA does "not require a public school to make comparable provisions for a disabled student voluntarily attending private school as for disabled public school students." *K.R. v. Anderson Cmty. Sch. Corp.*, 125 F.3d 1017, 1018 (7th Cir. 1997).[5]

Subparagraph (A) delineates the general obligations of a State to disabled "children enrolled in private schools by their parents." *First*, each public agency must locate, identify, and evaluate all private school children residing in its district. 20 U.S.C. § 1412(a)(10)(A)(ii) (the "child-find requirement"); 34 C.F.R. § 300.451. *Second*, the public agency must create a "services plan" of special education and related services and

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[4] On placement of disabled children in private school by public agencies, *see, e.g., Z.W. v. Smith*, 20 F. App'x 282, 283 (4th Cir. 2006) (at IEP meeting public school district "confirmed that it did not have an appropriate public school placement for [child] and agreed to fund his education at a non-public day school"); *Yates v. Charles County Bd. of Ed.*, 212 F. Supp. 2d 470, 471 (D. Md. 2002) (under terms of IEP, public school district "agreed to place [child], at public expense, at the Kennedy Krieger School, a private institution").

[5] *See also Russman v. Bd. of Educ. of County of Watervliet*, 150 F.3d 219, 221 (2d Cir. 1998); *Gary S. v. Manchester Sch. Dist.*, 374 F.3d 15, 20 (1st Cir. 2004); *Cefalu ex rel. Cefalu v. E. Baton Rouge Parish Sch. Bd.*, 117 F.3d 231, 232-33 (5th Cir. 1997); *Foley v. Special Sch. Dist. of St. Louis County*, 153 F.3d 863, 865 (8th Cir. 1998).

reasonably accommodate students to participate in that plan. 20 U.S.C. § 1412(a)(10)(A)(i); 34 C.F.R. §§ 300.452, 300.455-56. *Third*, the agency must consult with private school representatives and parents in the development of the services plan. 20 U.S.C. § 1412(a)(10)(A)(iii); 34 C.F.R. § 300.454(b)-(c). *Fourth*, a private school official may submit a complaint regarding the state agency's consultation process, 20 U.S.C. § 1412(a)(10)(A)(v), and a parent may request a due process hearing to challenge a public agency's satisfaction of its "child find" obligations. 34 C.F.R. § 300.457(b).

Counterbalancing these entitlements are strict limitations on state obligations to unilaterally-placed children. Most significantly, States are required to provide to children voluntarily enrolled in private schools only those services that can be purchased with a proportionate amount of the federal funds that they receive under IDEA. 20 U.S.C. § 1412(a)(10)(A)(i)(I)-(II); 34 C.F.R. § 300.453. Consequently, private school children with disabilities have no "individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school." 34 C.F.R. § 300.454(a). Moreover, the public agency "shall make the final decisions with respect to the services plan to be provided to eligible private school children," while affording parents only an "opportunity to express their views," 34 C.F.R. § 300.454(b), rather than a due process hearing. *Id.* § 300.457(a).[6]

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[6] In contrast, a disabled child enrolled in public school has an individual right to special education and related services, ensured through the use of an IEP, 34 C.F.R. § 300.320; the public agency "must take steps to ensure that one or both of the parents of a child with a disability are present at each IEP Team meeting or are afforded the opportunity to participate" in the formulation of the IEP, *id.* §§ 300.322, 300.501; and, if not satisfied, those parents have numerous "procedural safeguards," in-

Subsection (C) is the sole exception to the general rule of non-reimbursement for unilateral private placements without the prior approval of a public agency. It was added to IDEA in 1997, following this Court's decisions in *School Committee of Town of Burlington v. Department of Education*, 471 U.S. 359 (1985), and *Florence County School District Four v Carter*, 510 U.S. 7 (1993), which upheld reimbursement in certain circumstances for unilateral private placements of children who had previously been enrolled in public school. *See Burlington*, 471 U.S. at 361-62 (prior to being placed by his parents in private school, child attended "a public school in Burlington . . . under an IEP"); *Florence County*, 510 U.S. at 10 (prior to being placed by her parents in private school, child was "in a school operated by" the public school district, which formulated an IEP for her).

Mindful that federal funds then comprised only 6-8% of the amount needed to educate each State's disabled children, Br. *Amicus Curiae* of United States at 2, *K.R. v. Anderson Cmty. Sch. Corp.*, 521 U.S. 1114 (1997), Congress took care in the 1997 amendments to protect the States' fisc. "One specific purpose of the [1997] amendments was to control government expenditures for students voluntarily placed in private schools." *Greenland Sch. Dist. v. Amy N.*, 358 F.3d 150, 152 (1st Cir. 2004). It did so through the provisions of 20 U.S.C. § 1412(a)(10), with its narrowly-defined and limited provision allowing reimbursement for unilaterally-placed children only in certain instances.

A claim for tuition reimbursement for such children is thus a narrow exception to the general rule of non-reimbursement.[7] Strictly construing the exception to the general rule of

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cluding independent administrative and judicial review of the IEP. *Id.* §§ 003.500 *et seq.*

[7] *Compare* 20 U.S.C. § 1412(a)(10)(C)(i) (in general, IDEA "does not require a local educational agency to pay for the cost of . . . special education of a child with a disability at a private school . . . if that agency

non-reimbursement is the "'only . . . permissible meaning[] [of the provision that] produces a substantive effect that is compatible with the rest of the law.'" *Smith v. United States*, 508 U.S. 223, 233 (1993) (quoting *United Sav. Ass'n v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988)).

B. Other Language in Subsection (C) Supports the Conclusion That Prior Enrollment in Public School is a Precondition for Tuition Reimbursement

In addition to the provisions surrounding subsection (C), other language *within* that subsection also supports the conclusion that tuition reimbursement is available only to parents of a child with a disability who unilaterally enroll their child in private school after the child has "received special education and related services under the authority of a public agency."[8] *First*, Congress' use of the past tense throughout

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made a [FAPE] available to the child") *with id.* § 1412(a)(10)(C)(ii) (tuition reimbursement may be available for a child unilaterally enrolled in private school if the child "previously received special education . . . under the authority of a public agency . . . if the court or hearing officer finds that the agency had not made a [FAPE] available to the child in a timely manner prior to that enrollment").

[8] Although this Court has not construed the language "under the authority of a public agency," it has made clear that similar language in IDEA, "under public supervision and direction," does not encompass unilateral parental placements in private schools. *See Florence County*, 510 U.S. at 13 (quoting 20 U.S.C. § 1401(a)(18) (A)).

The statute defines "special education and related services" under 20 U.S.C. § 1412(a)(10)(C)(ii). "Special education" is "specially designed instruction . . . to meet the unique needs of a child with a disability," and includes instruction in the classroom, home, physical education, and other settings. *Id.* § 1401(29)(A) & (B). "Related services" include "transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services) . . . as may

the subsection demonstrates that reimbursement depends on the child's previous public placement. *See, e.g., United States v. Wilson*, 503 U.S. 329, 333 (1993) ("Congress' use of a verb tense is significant in construing statutes."); *Gwaltney of Smithfield Ltd. v. Chesapeake Bay Found. Inc.*, 484 U.S. 49, 59 (1987) (same); *Otte v. United States*, 419 U.S. 43, 49-50 (1974) (same). Subparagraph (C)(i) states that reimbursement is not available when the public agency

> *made* a free appropriate public education available to the child, and the parents *elected* to place the child in . . . [a] private school or facility.

20 U.S.C. § 1412(a)(10)(C)(i) (emphasis added). Similarly, subparagraph (C)(ii) makes reimbursement available when the public agency

> *had not made* a free appropriate public education available to the child in a timely manner *prior* to [their] enrollment [in a private school].

Id. § 1412(a)(10)(C)(ii) (emphasis added).

By using the operative verbs in the past and past perfect tenses, Congress indicated that the *existence* of the State's obligation to provide a FAPE—as well as its subsequent failure to do so—is a condition precedent to reimbursement for private school tuition. Because the State is not obligated to provide a FAPE to children in private schools, 20 U.S.C. § 1412(a)(10)(A); *Florence County*, 510 U.S. at 13-14, it necessarily follows that parents of children unilaterally enrolled in private school before they are entitled to a FAPE are not entitled to reimbursement.[9]

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be required to assist a child with a disability to benefit from special education . . . ." *Id.* § 1401(26)(A).

[9] The applicable regulations confirm this construction. The section dealing with private school reimbursement is entitled "Children With Disabilities Enrolled By Their Parents in Private School *When [A] FAPE*

Second, IDEA's "limitations" on reimbursement support this conclusion. While subparagraph (C)(ii) authorizes reimbursement for certain privately-placed children, the next subparagraph, clause (iii), states that "the cost of reimbursement described in clause (ii) may be reduced or denied . . . if":

> (I) . . . at the most recent *IEP meeting* that the parents attended *prior to removal of the child from the public school*, the parents *did not* inform the IEP team that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and *intent to enroll their child in a private school* at public expense; or . . . 10 business days . . . *prior to the removal of the child from the public school*, the parents did not give written notice to the public agency . . .; [or]
>
> (II) . . . *prior to the parents' removal of the child from the public school*, the public agency informed the parents . . . of its intent to evaluate the child . . . , but the parents did not make the child available for such evaluation.

Section 1412(a)(10)(C)(iii)(I)-(II) (emphasis added). This limitation applies to all reimbursement claims "described in clause (ii)," and read together with that clause, reinforces the conclusion that prior enrollment in public school is a precondition for tuition reimbursement. Specifically, an IEP meeting must occur, and notice of parental discontent must be given, "*prior to removal of the child from public school*" and before the parents make good on their "*intent to enroll their*

Is At Issue." 34 C.F.R. § 300.403 (emphasis added). Because privately-placed students are not entitled to either an IEP or the FAPE which the IEP is designed to achieve, *see Florence County*, 510 U.S. at 13, these regulations support the view that a parent who enrolls the child in private school before a public agency determines that the child is entitled to special education is not entitled to tuition reimbursement.

child in private school." The upshot of this language leaves little room for debate: previous public school enrollment was viewed by Congress as a precondition for tuition reimbursement.

C. The Purposes of IDEA Will Be Subverted If Parents Who Do Not Send Their Child to Public School Can Obtain Tuition Reimbursement Solely Through Litigation

Under the holding below, parents of any disabled child who attends private school (and who never intended to send their child to public school) can go through the motions of cooperating with public school authorities on an "IEP team" and thereafter roll the dice on a tuition reimbursement claim by arguing that the IEP is "inappropriate." This rule of law discourages constructive involvement of private school parents in IEP formulation in a manner directly contrary to Congress' intent that "IDEA's promise of a 'free appropriate education' for disabled children would normally be met by . . . education in the regular public schools or in private schools chosen jointly by school officials and parents." *Florence County*, 510 U.S. at 12. Equally important, such a rule disregards Congress' express instruction that "'to the maximum extent appropriate' [States] must educate handicapped children 'with children who are not [handicapped].'" *Rowley*, 458 U.S. at 181 (quoting 20 U.S.C. § 1412(a)(5)(A)). This, too, is contrary to fundamental principles of statutory interpretation. *See John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 97 (1993) (Where Congress has expressed a "general policy" in a "comprehensive scheme," and then qualified that policy with an exception, this Court "usually read[s] the exception narrowly in order to preserve the primary operation of the [policy].") (internal quotation marks omitted).

Unless reversed by this Court, the holding below will necessarily divert funds from the education of disabled children to the formulation of IEPs that will never be implemented and whose crafting will be followed by costly litigation to obtain tuition reimbursement and attorney's fees. All of this is directly contrary to Congress' unequivocal directive that "[t]eachers, schools, local education agencies, and States should be relieved of irrelevant and unnecessary paperwork burdens that do not lead to improved educational outcomes" for disabled children. 20 U.S.C. § 1400(c)(9).

Before 1997, the federal government supplied States only six to eight percent of the funds needed for special education services for disabled students. Federal aid has subsequently increased to about 18%. *See* National School Boards Association, *IDEA Funding: Time for a New Approach* (March 2003). To be sure, by participating in the IDEA States incur an obligation to allocate a proportional share of that federal money to unilaterally-placed private school children with disabilities. *See* 20 U.S.C. § 1412(a)(10)(A). But encouraging litigation by parents who never intend to send their children to public school defeats the goal of "more equitable allocation of [IDEA] resources" recently called for by Congress. *See id.* § 1400(c)(7). It inevitably diverts finite special education resources away from public schools in order to pay for private school education that would otherwise be paid for by parents.

In States where the percentage of privately-placed children with disabilities has increased significantly over the past decade,[10] the increased cost of reimbursement claims is a

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[10] For example, the California Department of Education reports that private enrollment for students with disabilities has risen nearly five times faster than the overall increase in special education students. Since 1993, the number of students in public special education programs rose 27 percent, to 681,969 from 539,073, but special education students placed in private schools at public expense rose 128 percent, to 15,926 from 6,994.

major policy concern. "[T]he IDEA is not intended in all instances to further the broad goals identified by the [the Act] at the expense of fiscal considerations." *Arlington Central Sch. Dist. Bd. of Educ. v. Murphy*, 126 S. Ct. 2455, 2463 (2006).[11]

Further, and more specifically, affirmance of the judgment below would simply exempt parents who choose private school for their children at the outset from the express provisions of § 1412(A)(10)(C)(iii), which make cooperative interactions with school officials relevant to or dispositive of a reimbursement claim. Those provisions impose duties upon parents "prior to removal of the child from the public school" and before they "enroll their child in a private school." *Id. See Loren F. v. Atlanta Indep. Sch. Sys.*, 349 F.3d 1309, 1317-19 (11th Cir. 2003). Consequently, such parents could more easily seek tuition reimbursement than parents who follow the IDEA scheme in good faith. Gaming the system would be rewarded over working within the system to achieve IDEA's core goals of "normally" educating disabled children "in the regular public schools," *Florence County*, 510 U.S. at 12, and "to the maximum extent appropriate . . . with children who are not [disabled].'" *Rowley*, 458 U.S. at 181 (quoting 20 U.S.C. §1412(a)(5)(A)).

Nanette Asimov, *Extra-Special Education at Public Expense*, SAN FRANCISCO CHRON., Feb. 19, 2006, at A1.

[11] Tuition, attorney's fees, and other litigation costs are not the only public expenditures involved in tuition reimbursement cases. Preparing a detailed IEP for a disabled child involves numerous consultations and meetings, extensive testing and other public special education resources. *See* J.A. 19-25 (evidence submitted by petitioner Bd. of Ed. to IHO reviewing Gilbert F.'s IEP); *id.* at 42 (findings of fact by SRO) ("In preparation for annual review for the 1999-2000 school year, the CSE conducted several updated evaluations, obtained current progress reports from Gaynor and reviewed existing evaluation reports.").

Such a perverse reordering of priority for IDEA funds would favor disabled students from families who can afford a full-time private placement at the outset of IDEA eligibility to the detriment of less affluent ones who will likely begin their education in public school. *Cf. Schaffer*, 546 U.S. 49 (burden of proof in IEP challenge is on parents); *Arlington Central Sch. Dist.*, 126 S. Ct. at 2457 (expert fees non-reimbursable). Moreover,

> [o]nce some students obtain private placements, it is easier for others to do so. A network of parents and lawyers develops as private placements become more common, spreading information about options and strategies. So private placement may beget more private placement. If obtaining a private placement requires a battle with school officials, parents with greater awareness of their legal rights and greater resources to engage in the fight are more likely to win.

Greene & Winters, *supra*, 2007 Education Next at 4-5.[12] The decision of the court below fosters this trend, which is contrary to Congress' intent that disabled children have equal opportunities under the IDEA without regard to race or class. *See Rowley*, 458 U.S. at 194 n.18.

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[12] Anecdotal evidence of this trend is increasing. *See, e.g.*, Alison Leigh Cowan, *Amid Affluence, A Struggle Over Special Education*, N.Y. TIMES, Apr. 24, 2005; Julie Rawe, *Who Pays for Special Ed?*, TIME, Sept. 17, 2006; Yilu Zhao, *Rich Disabled Pupils Go To Private School at Public Expense*, N.Y. TIMES, Apr. 17, 2002; Nanette Asimov, *supra*, SAN FRANCISCO CHRON., at A1. Fifty percent of the approximately 1,240 yearly requests for tuition reimbursement in New York City Public Schools "were pursued by parents whose children have never attended nor plan to enroll in public school, but s[aw] the opportunity for their child's private education to be paid for at public expense." Testimony of Dr. Harold Levy, *Presidential Commission on Special Education, Assessment and Identification Task Force Hearing*, April 16, 2002.

D. Reading the Plain Language of § 1412(a)(10)(C)(ii) to Mean What It Says Does Not Lead to Absurd Results

The Second Circuit's construction of § 1412(a)(10) was based in part on its view that a straightforward reading of the statute's text leads to "absurd results." J.A. 105. The court therefore held that the "previous[] recei[pt] of special education and related services under the authority of a public agency," 20 U.S.C. § 1412(a)(10)(c)(ii), is not a precondition for tuition reimbursement because such a requirement would:

> prevent children who are provided with inadequate IEPs from receiving a free appropriate public education if their disabilities were detected before they reached school age, . . . [and] also place the parents of children with disabilities in the untenable position of acquiescing to an inappropriate placement in order to preserve their right to seek reimbursement from the public agency that devised the inappropriate placement.

J.A. 105. Contrary to the reasoning of the court of appeals, these concerns are illusory. IDEA provides ample opportunity for a child to receive "special education and related services" from public agencies without acquiescing to an "inappropriate placement."

At the early stages of a disabled child's education, IDEA specifically contemplates the provision of "special education and related services" to "toddlers with disabilities about to enter preschool," H.R. Rep. No. 105-95, at 92, *reprinted in* 1997 U.S.C.C.A.N. 78, 89, and "recognize[s] the importance of early intervention for infants . . . with disabilities from birth through age two." *Id.* at 115, 1997 U.S.C.C.A.N. at 113. To implement this objective, section 1419 of the Act "provides grants . . . to assist states to provide special education and related services" to these infants and toddlers, and sections 1431-44 set forth the "early intervention serv-

ices" that public agencies can provide, *id.* §§ 1431-44, often at "no cost." 20 U.S.C. § 1432(4)(B).[13]

Children who have received these early intervention services before reaching school age have "received special education and related services under the authority of a public agency" and can thus seek tuition reimbursement as they approach elementary school age if they are given an inappropriate IEP before entering school. Thus, parents can begin the IEP process in the months before their child's first school year; if an appropriate placement is not offered at this time, the parents can provide the requisite notice of "removal" before the school year begins, 20 U.S.C. § 1412(a)(10)(C)(iii)(I), "remove" their child from the public school by declining to have them attend,[14] and enroll them in private school while retaining a reimbursement claim, all without "acquiescing to an inappropriate placement." J.A. 105.

The second absurd result identified by the Second Circuit is that reading the statute to mean what it says places "the parents of children with disabilities in the untenable position of acquiescing to an inappropriate placement." *Id.* But this concern rests on the premise of a flagrantly inadequate IEP, such that it is unreasonable to require the child to try out the public school plan, even for a very short time. While that situation is imaginable, there is no reason to believe that it is other than exceedingly rare.

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[13] These sections of IDEA are in Subchapter III, "Infants and Toddlers with Disabilities."

[14] The only court to consider the meaning of "removal" in the statute concluded that "if the removal occurs during the school year, the [10-day notice period] count[s] back from the date of the intended actual physical removal." However, "[i]f the decision to enroll in private school occurs during a summer recess, the [notice period for removal] mark[s] from the beginning of the public school year" when the child fails to show up in class. *Sarah M. v. Weast*, 111 F. Supp. 2d 695, 701 (D. Md. 2000).

Indeed, the foregoing premise reflects contempt for the expertise of public school special education specialists that is directly contrary to this Court's teachings. As *Schaffer* made clear eight months before the court of appeals decided this case, this Court does not "assume that every IEP is invalid until the school district demonstrates that it is not. The Act does not support this conclusion. *IDEA relies heavily upon the expertise of school districts to meet its goals.*" 546 U.S. at 59 (emphasis added); *id.* at 62-63 (Stevens, J., concurring) (joining opinion of the Court "because I believe that we should presume that public school officials are properly performing their difficult responsibilities under this important statute"). *See also Rowley*, 458 U.S. at 206 (judicial review under IDEA "is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review").

Finally, there will undoubtedly be cases in which a disabled child *might* receive an optimal education in an exclusive private school preferred by the parent but not included in the child's IEP by the public agency, although even this will often be debatable by special education experts. But as this Court held 25 years ago, IDEA "contains no requirement . . . that States maximize the potential of handicapped children 'commensurate with the opportunities provided to other children.'" *Rowley*, 458 U.S. at 189-90 (citation omitted).

> By passing the Act, Congress sought primarily to make public education available to handicapped children. But in seeking to provide such access to public education, Congress did not impose upon the States any greater substantive educational standard than would be necessary to make such access meaningful. Indeed, Congress expressly "recognize[d] that in many instances the process of providing special education and related services to handicapped children is not guaranteed to produce any particular outcome."

Id. at 192 (quoting S. Rep. No. 94-168, at 11, *reprinted in* 1975 U.S.C.C.A.N. 1425, 1435).

It is thus apparent that the absurd results which influenced the court below are chimerical. Of course, there are parents who always intended to send their children to private school and would like to see if IDEA litigation can produce a judicial award of tuition reimbursement. This Court has already ruled in *Burlington* and *Florence County* that parents dissatisfied with special education services sought and provided by a public school may unilaterally place their child in a private school and later seek reimbursement and attorney's fees. *See Burlington,* 471 U.S. at 361; *Florence County*, 510 U.S. at 10-11. Under the express terms of the IDEA, however, they may not do so unless their child has previously received special education and related services under the authority of the public school.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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